Supreme Court U.S.
FILED
JUL 12 2002
OFFICE OF THE CLERK

(2)

No. 01-1573

In The

Supreme Court of the United States

DAVID W. OAKLEY,

Petitioner,

v.

STATE OF WISCONSIN,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF WISCONSIN

BRIEF FOR RESPONDENT IN OPPOSITION

JAMES E. DOYLE
Attorney General

DIANE M. WELSH*
Assistant Attorney General

Wisconsin Department of Justice
Post Office Box 7857
Madison, Wisconsin 53707-7857
(608) 266-1740

* *Counsel of Record*

QUESTION PRESENTED

Where petitioner was on probation for multiple counts of felony non-support of his children, did the trial court's order establishing that, as a condition of his probation, petitioner not father any additional children unless he demonstrates to the court that he will not intentionally refuse to support his present nine children and will support any future child, comport with petitioner's rights under the Fourteenth Amendment?

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

STATEMENT 1

REASONS FOR DENYING THE PETITION 6

I. As Construed By The Wisconsin Supreme Court, All The Probation Order Does Is "Essentially Ban[] Oakley From Violating The Law Again." 7

II. The Wisconsin Supreme Court Applied A Heightened Standard Of Review That Does Not Conflict With The Decisions Of Any Federal Court Of Appeals Or State's Highest Court, Or With Any Decisions Of This Court 8

A. The Wisconsin Supreme Court applied a heightened standard of review. 8

B. The standard of review applied below does not create a conflict with a federal court of appeals or among the states' highest courts 9

C. The decision below in no way conflicts with *United States v. Knights* 11

III. The Wisconsin Supreme Court's Decision Upholding The Probation Order Does Not Conflict With The Holding Of Any Federal Court Of Appeals Or A State's Highest Court. 13

IV. This Case Is Not Otherwise Appropriate For Review. 14

CONCLUSION 19

Cases

Carey v. Population Servs. Int'l,
431 U.S. 678 (1977) 15

Edwards v. State,
246 N.W.2d 109 (Wis. 1976) 5, 8, 9

Eisenstadt v. Baird,
405 U.S. 438 (1972) 15

Griffin v. Wisconsin,
483 U.S. 868 (1987) 11

Griswold v. Connecticut,
381 U.S. 479 (1965) 15

Meyer v. Nebraska,
262 U.S. 390 (1923) 18

People v. Pointer,
199 Cal. Rptr. 357 (Cal. Ct. App. 1984) 10, 13

Robinson v. City of West Allis,
619 N.W.2d 692 (Wis. 2000) 2

Skinner v. Oklahoma,
316 U.S. 535 (1942) 14, 15

State v. Livingston,
372 N.E.2d 1335 (Ohio App. 1976) 13

State v. Mosburg,
768 P.2d 313 (Kan. Ct. App. 1989) 10, 13

Thomas v. State,
519 So. 2d 1113 (Fla. Dist. Ct. App. 1988) 14

Troxel v. Granville,
530 U.S. 57 (2000) 18

United States v. Knights,
534 U.S. 112, 122 S.Ct. 587 (2001) 11, 12, 16

United States v. Smith,
972 F.2d 960 (8th Cir. 1992) 10, 13

Wiggins v. State,
386 So. 2d 46 (Fla. App. 1980) 14

Zablocki v. Redhail,
434 U.S. 374 (1978) 16

Statutes

18 U.S.C. § 3553 14

18 U.S.C. § 3563 14

Wis. Stat. § 49.90 (1997-98) 1

Wis. Stat. § 973.09(1) (1997-98)..... 9

Other Authorities

Sherry F. Colb, Freedom from Incarceration:
Why is this Right Different from All Other Rights?,
N.Y.U. L. Rev. 781 (1994)..... 18

STATEMENT

The petitioner, David Oakley ("petitioner" or "Oakley"), has nine minor children, who are being raised by their mothers. Through various orders relating to seven of his children, Oakley is required to pay child support to the four mothers (6/16/98 Tr. at 8-10). Although there were no support orders for Oakley's two youngest children, he was still legally obligated to provide for their support under Wis. Stat. § 49.90 (1997-98).

In November and December of 1997, just prior to the time period relating to the criminal charges in this case, Oakley was in the Sheboygan County Jail for an unrelated offense, and on work release (6/16/98 Tr. at 18). While Oakley was in jail, the State garnished the wages he received through work release to fulfill his child support obligations. When Oakley was released from custody, he quit this employment (*id.*), and he quit paying child support (*id.* at 3-7, 13-15).

Because they are unsupported by the appellate record, the respondent disputes any assertions or suggestions by Oakley that he was unemployed, impoverished, or unable to obtain employment from January through April of 1998, the time he intentionally failed to support his children.[1] The record does not indicate what, if any, employment Oakley had during this time period. The record does not demonstrate what, if any, efforts Oakley made to secure full-time employment after terminating the position he had in Sheboygan. The record

---

[1] The factual record is relatively undeveloped because Oakley pled no contest, and hence, there was no trial and no presentation of evidence in the trial court, aside from the limited evidence presented at the preliminary hearing.

does indicate that Oakley possesses a variety of job skills including roofing, foundry, remodeling, and factory work, and that he is not physically or emotionally disabled, such that he is precluded from doing hard work (1/13/99 Tr. at 22).

The record provides no support for Oakley's contention that he "indisputably has made substantial efforts to comply with his child-support obligations, having paid seventy percent of the amounts he owes." Pet. at 3. No evidence was presented to the court as to how much money Oakley has paid toward support over the years. There has been no factual finding that his compliance constitutes "substantial efforts." Rather, evidence presented at the preliminary hearing showed that Oakley had not provided any support for his nine children for six months, including the charged time period of January through April of 1998 (6/16/98 Tr. at 3-7, 13-15). The record also shows that Oakley was over $25,000 in arrears at that time (1/13/99, Ex. 1).

Pursuant to a plea agreement, Oakley pled no contest to three counts of intentionally failing to support his children (1/13/99 Tr. at 10). The charges were enhanced because Oakley had a prior felony offense[2] (6/16/98 Tr. at 27). Four

---

[2] The prior felony offense was the Sheboygan County conviction. Oakley was convicted of witness intimidation in a child abuse case, in which he threatened a witness who was the subject of a no-contact order (Def.-App.-Pet'r's Mot. for Recons., Ex. 4 at 1). Contrary to Oakley's assertion (Pet. at 6 n.4), the underlying charge of child abuse was not meritless. Rather, pursuant to a plea agreement under which Oakley pled guilty to the witness intimidation charge, the child abuse charge was dismissed and read in at sentencing (Def.-App.-Pet'r's Mot. for Recons., Ex. 1 at 5; Ex. 3). When a defendant agrees to a read-in charge as part of a plea to another charge, he admits the conduct underlying the read-in charge, and agrees that the conduct can be considered both in sentencing him on the charge of which he is convicted and in imposing restitution. *Robinson v. City of West Allis*, 619 N.W.2d 692, ¶¶41-42 (Wis. 2000).

additional counts of failure to support four additional children during the same time period were dismissed and read in for the purposes of sentencing (1/13/99 Tr. at 2).

Before accepting Oakley's no-contest plea, the trial court conducted a plea colloquy (1/13/99 Tr. at 3-9). The court established that Oakley understood the elements of the offense, including that he had a legal obligation to support the children and that he intentionally or willfully failed to provide that support (*id.* at 4). By pleading no contest, Oakley admitted that he intentionally failed to support his children. Any present suggestion that he simply could not afford to support his children is inconsistent with his no-contest plea and must be rejected.

On count one, the trial court sentenced Oakley to three years' imprisonment, consecutive to his sentence for the Sheboygan County felony offense (*id.* at 27). On counts two and three, the court sentenced Oakley to eight years' imprisonment, concurrent to count one, but stayed the sentence and ordered five years of probation (*id.* at 28). As conditions of probation, the court ordered that Oakley spend three to six months in the county jail, where he could use the work-release officer to help him find a job (*id.* at 29). The court ordered that Oakley maintain full-time employment and "comply with the support orders as they may be consistent with [his] ability to pay" (*id.* at 29-30). The court also ordered Oakley: "that you not have any further children while you're on probation unless you can demonstrate you have the ability to support them and have been consistent in your support of the children that you already have" (*id.* at 30).

Contrary to petitioner's assertion, the court did not impose the condition "knowing [he] would be unable to satisfy it." Pet. at 4. The Wisconsin Supreme Court opinion

directly contradicts this suggestion, stating that "a careful reading of the record uncovers no such acknowledgement by Judge Hazlewood." Pet. App. at 14a-15a n.21. "Instead, the record reveals Judge Hazlewood's recognition that Oakley might not be able to earn large amounts of money in the future, but that he would be expected to provide support based on his ability to earn and pay." *Id.* Judge Hazlewood repeatedly indicated that if the court-ordered amounts of child support were too high, then Oakley should seek to have the orders adjusted, rather than simply ignoring the orders or choosing not to comply with the orders (1/13/99 Tr. at 23-24, 27, 28, 29).

Judge Hazlewood also made it clear to Oakley that Oakley could return to court to ask it to change the condition of probation forbidding him from fathering another child. The judge stated that if Oakley could demonstrate that he was supporting his present children and had the ability to support another child, the court would modify the condition (*id.* at 30).

Judge Hazlewood discussed the rationale for the sentence, including the prison sentence and the probation conditions. The judge indicated that perhaps the experience of going to prison would serve as a wake-up call, resulting in Oakley assuming his responsibilities with respect to his children (*id.* at 28). Judge Hazlewood stated that he hoped Oakley could acquire additional skills while in prison to improve his job prospects (*id.*). The judge stressed the need for Oakley to assume the responsibility for the support of his children (*id.*).

Oakley did not contest the conditions of his probation at sentencing. Oakley subsequently moved the trial court to modify the condition prohibiting him from fathering another child unless he was in compliance with his child support

orders, arguing that the condition was not reasonable and appropriate and that it violated the Fourteenth Amendment (12/1/99 Mot.). The court denied the motion, noting that Oakley's offenses are entirely related to his fathering of children that he is not inclined to support. Pet. App. 50a-51a. The court said that Oakley's rehabilitation would not be eased by additional family responsibilities. Pet. App. 51a.

Oakley appealed to the Wisconsin Court of Appeals. The court of appeals rejected the challenge and affirmed the judgment of conviction. Pet. App. at 41a-45a. The Wisconsin Supreme Court granted Oakley's petition for review, and also affirmed. Pet. App. at 5a-40a.

The supreme court acknowledged the fundamental liberty interest of a citizen to choose whether or not to procreate. Pet. App. at 15a, ¶16. Nevertheless, the court stated that "conditions of probation may impinge upon constitutional rights as long as they are not overly broad and are reasonably related to the person's rehabilitation." Pet. App. at 18a-19a, ¶19, citing *Edwards v. State,* 246 N.W.2d 109, 111 (Wis. 1976). Applying that standard, the court found that the probation condition was "not overly broad because it does not eliminate Oakley's right to exercise his constitutional right to procreate." Pet. App. at 22a-23a, ¶20.

In reaching that conclusion, the court found that the probation condition did not limit Oakley's right to procreate nearly as much as Oakley suggested. The court construed the probation condition as merely requiring Oakley to "mak[e] efforts to support his children as required by law." *Id.* Hence, "[i]f Oakley decides to continue his present course of conduct -- intentionally refusing to pay child support -- he will face eight years in prison regardless of how many children he has." *Id.* Conversely, "Oakley can satisfy this condition by not intentionally refusing to support his

current nine children and any future children as required by the law." *Id.* In sum, "the condition essentially bans Oakley from violating the law again." *Id.* at 24a-25a, ¶21.

> [Oakley] can satisfy the condition of probation by making efforts to support his children as required by law. Judge Hazlewood placed no limit on the number of children Oakley could have. Instead, the requirement is that Oakley acknowledge the requirements of the law and support his present and any future children. If Oakley decides to continue his present course of conduct -- intentionally refusing to pay child support -- he will face eight years in prison regardless of how many children he has. Furthermore, this condition will expire at the end of his term of probation. He may then decide to have more children, but of course, if he continues to intentionally refuse to support his children, the State could charge him again under [Wis. Stat.] § 948.22(2). Rather, because Oakley can satisfy this condition by not intentionally refusing to support his current nine children and any future children as required by the law, we find that the condition is narrowly tailored to serve the State's compelling interest of having parents support their children. It is also narrowly tailored to serve the State's compelling interest in rehabilitating Oakley through probation rather than prison.

Pet. App. 22a-23a, ¶20 (footnotes omitted).

REASONS FOR DENYING THE PETITION

The issues raised by petitioner do not warrant this Court's review. *First*, the probation condition, as construed by the Wisconsin Supreme Court, is far narrower than petitioner suggests.[3] This undermines his claim of constitutional error and his claim that this case presents an issue of broad importance. *Second*, petitioner has miscast

---

[3] The Wisconsin Supreme Court's construction of the probation condition is a state law determination, settled by the State's highest court. Oakley is bound by this construction of the condition. Any implicit or explicit efforts he makes to broaden the construction of the probation condition must be rejected.

the standard of review applied by the Wisconsin Supreme Court and thereby contrived a conflict where none exists. *Third*, there is no conflict between the holding of the Wisconsin Supreme Court and the holding of any federal court of appeals or state's highest court; and there is no direct conflict between the holding below and the holding of any state intermediate appellate court. *Finally*, the Wisconsin Supreme Court correctly decided the issue before it.

I. As Construed By The Wisconsin Supreme Court, All The Probation Order Does Is "Essentially Ban[] Oakley From Violating The Law Again."

The probation condition at issue does not, contrary to the petition, prohibit Oakley from procreating during the full term of his probation, or until he is capable of paying his full child support obligations. *E.g.*, Pet. at 4, 9, 25. Rather, only if Oakley continues to *intentionally* fail to pay his obligations is he barred from procreating. Of course, if Oakley engages in the intentional refusal to pay his child support obligations, he will again be in violation of the Wisconsin Statutes, and he will be separately violating a different condition of probation, requiring that he not commit any crime. Either may lead to his further incarceration. This is why the Wisconsin Supreme Court concluded that the probation order "essentially bans Oakley from violating the law again." Pet. App. at 24a, ¶21.

Accordingly, the constitutional concerns raised by petitioner are not truly present in this case. This is not a case where the State has permanently or significantly limited a probationer's right to procreate. This is not a case where the State has limited the procreation, contraception, or matrimonial rights of a class of people. Rather, this case is

about one very specific probation condition imposed on the petitioner, which only limits his ability to procreate if he continues to choose to violate the law. In the end, the case is much ado about very little.

This case simply does not present "an ideal opportunity" to decide the question presented by the petitioner. If the question is truly an important question worthy of this Court's review, the question will likely arise in a number of cases. This is especially true if, as petitioner asserts (Pet. at 27-30), courts are frequently imposing conditions restricting procreation.

II. The Wisconsin Supreme Court Applied A Heightened Standard Of Review That Does Not Conflict With The Decisions Of Any Federal Court Of Appeals Or State's Highest Court, Or With Any Decisions Of This Court.

A. The Wisconsin Supreme Court applied a heightened standard of review.

It is well-settled law in Wisconsin that probation conditions that infringe on constitutional rights are permissible only if "they are not overly broad and are reasonably related to the person's rehabilitation." *Edwards*, 246 N.W.2d at 111. This standard was acknowledged as the appropriate standard in both the majority and the dissenting opinions in the present case. Pet. App. at 19a, ¶19 (articulating and applying *Edwards* standard); 30a-31a, ¶45 (Bradley, J., dissenting) (indicating that condition is subject to heightened scrutiny under *Edwards*); 38a, ¶68 (Sykes, J., dissenting) (agreeing with majority that the applicable test is set forth in *Edwards*). As Justice Bradley accurately states in her dissenting opinion, "whether one chooses to frame the

means-end inquiry in a case involving the right to procreate while on probation as 'not overly broad' or as 'narrowly drawn,' I believe the essence of the inquiry is the same." Pet. App. at 31a, ¶45.

The mere fact that the majority labeled this standard a "reasonableness" standard (Pet. App. at 19a n.27) does not change the substance of the standard, which is one that requires heightened scrutiny. Further, the *Edwards* test that was applied here is not the same as the statutory requirement that the conditions be "reasonable and appropriate." Wis. Stat. § 973.09(1) (1997-98). The "reasonable and appropriate" statutory standard is applied to all challenges of probation conditions, even those that do not implicate constitutional rights. When the probationer also challenges the condition on constitutional grounds, the heightened standard articulated in *Edwards* is necessary.

Petitioner suggests that the Wisconsin courts would use the same test to review challenges to probation conditions, regardless of whether or not the condition impinges on one's constitutional rights. Pet. at 12. This is not what Wisconsin precedent directs, nor is it suggested by the opinion below. Where, as here, a constitutional right is burdened by a probation condition, then the condition will be sustained only if the condition is not overly broad and is reasonably related to the person's rehabilitation. Pet. App. at 19a, ¶19, citing *Edwards*, 246 N.W.2d at 111.

B. The standard of review applied below does not create a conflict with a federal court of appeals or among the states' highest courts.

Petitioner contends that certiorari should be granted because of a conflict among the state and federal courts. Pet.

at 9-11. Notably, petitioner cites only one federal court of appeals decision and decisions of the intermediate appellate courts of several states to support his contention. Petitioner does not identify a single decision of a state's highest court that is arguably in conflict with the decision below.

The heightened level of scrutiny applied by the court below is consistent with *United States v. Smith*, 972 F.2d 960, 962 (8th Cir. 1992) (stating that conditions that restrict a probationer's freedom must be especially fine-tuned). It is also consistent with decisions of other state courts which applied a heightened standard of review to reach the constitutional question. *See, e.g, People v. Pointer*, 199 Cal. Rptr. 357, 364 (Cal. Ct. App. 1984) (subjecting condition that infringes on constitutional right to "special scrutiny" to determine whether the condition is entirely necessary to serve the dual purposes of rehabilitation and public safety); *State v. Mosburg*, 768 P.2d 313, 314 (Kan. Ct. App. 1989) (indicating that there are limitations on probation conditions that infringe on constitutional rights).

In each of these cases, just as in the present case, the court recognized that a heightened level of scrutiny is necessary when evaluating probation conditions that infringe on constitutional rights. Although the language used by each court varied, there is little substantive difference in the articulated standards. Any differences in the phraseology of the standards for evaluating the validity of probation conditions, as articulated by the state and federal appellate courts, do not justify the grant of certiorari in the present case.

In the present case, the petitioner and respondent agree that a heightened standard of review is required when evaluating a probation condition that impinges on a

constitutional right. The Wisconsin court applied such a heightened standard of review.

C. The decision below in no way conflicts with *United States v. Knights*.

Contrary to petitioner's argument (Pet. at 8, 12-13), Wisconsin's standard of review does not conflict with *United States v. Knights*, 534 U.S. 112, 122 S.Ct. 587 (2001). This Court's decision in *Knights* does not articulate the applicable standard to be applied when addressing whether a probation condition that impinges on a constitution right is valid. *See generally, Knights*, 122 S.Ct. 587.

In *Knights*, the Court was not asked to determine the constitutional validity of a probation condition requiring Knights to submit to searches, by any probation officer or law enforcement officer, without a warrant or reasonable cause. *Id.* at 588. That is because Knights did not challenge the validity of the probation condition. Rather, after law enforcement personnel conducted a search of Knights' property and found evidence of criminal activity, Knights sought to suppress evidence of the search, asserting that the search violated the Fourth Amendment. *Id.* at 588-90. Hence, the question before the Court was whether that warrantless search by law enforcement, which was supported only by reasonable suspicion, was reasonable within the meaning of the Fourth Amendment such that the evidence was admissible at Knights' criminal trial. *Id.* at 590.

In deciding that the search complied with the Fourth Amendment, the Court stated: "Inherent in the very nature of probation is that probationers 'do not enjoy the "absolute liberty to which every citizen is entitled."'" *Id.* at 591, quoting *Griffin v. Wisconsin*, 483 U.S. 868, 874 (1987). "Just

as other punishments for criminal convictions curtail an offender's freedoms, a court granting probation may impose reasonable conditions that deprive the offender of some freedoms enjoyed by law-abiding citizens." *Id.* The Court stated that the probation condition was reasonable under California law.[4] *Id.* at 591-92. Thus, to the extent that the Court discussed the validity of the probation condition, it did so by articulating the California test that is generally used for challenges to probation conditions, rather than a heightened standard of review.

The Court did not purport to set a general standard for evaluating probation conditions, however. Indeed, the Court expressly declined to consider whether the unconstitutional conditions doctrine applied, whether Knights' consent was a complete waiver of his Fourth Amendment rights, and whether police could have conducted a suspicionless search. In the end, all the Court did was hold that the search was supported by reasonable suspicion and was "reasonable under our general Fourth Amendment approach of 'examining the totality of the circumstances,' *Ohio v. Robinette*, 519 U.S. 33, 39, [] (1996), with the probation search condition being a salient circumstance." *Knights*, 122 S.Ct. at 591.

The standard of review applied below simply is not in conflict with this Court's opinion in *Knights* or any relevant decision of this Court.

---

[4] The Court's indication that the condition was reasonable was based on the following California standard: "Under California law, a probation condition is invalid if it (1) has no relationship to the crime of which defendant was convicted; (2) relates to conduct which itself is not criminal; and (3) requires or forbids conduct which is not reasonably related to future criminality." *Knights*, 122 S. Ct. at 592 n.5 (citation omitted).

III. The Wisconsin Supreme Court's Decision Upholding The Probation Order Does Not Conflict With The Holding Of Any Federal Court Of Appeals Or A State's Highest Court.

Petitioner cites to one federal court of appeals case and several cases from various intermediate appellate state courts that have ruled that a probation condition was invalid. Pet. at 19-20. Petitioner has not identified a single decision from a federal court of appeals where a probation condition was invalidated on federal constitutional grounds. Likewise, petitioner has not identified a single decision from the highest court of any state that invalidated a probation condition limiting procreation, on any grounds.

In the decisions cited by petitioner, some of the probation conditions were invalidated because they were found to be unconstitutional. *See, e.g., Pointer*, 199 Cal. Rptr. at 365-66 (holding probation condition prohibiting probationer who was convicted of child endangerment from becoming pregnant was overly broad and not intended to serve any rehabilitative purpose); *State v. Livingston*, 372 N.E.2d 1335, 1337-38 (Ohio App. 1976) (holding probation condition prohibiting the bearing of children is an unreasonable and unconstitutional burden to place on an already pregnant woman); *Mosburg*, 768 P.2d at 315 (determining condition prohibiting probationer who was convicted of endangering a child from becoming pregnant unduly intrudes on probationer's right to privacy). Most of the conditions in these cases, however, were invalidated because the conditions were determined to be unreasonable or in violation of applicable statutes. *See, e.g., Smith*, 972 F.2d at 962 (determining that condition barring probationer who was convicted of possession of heroin with intent to distribute from conceiving children other than to his wife, unless he demonstrated that he is fully providing support to his three

present children, did not meet the standards of 18 U.S.C. §§ 3553 and 3563); *Wiggins v. State*, 386 So. 2d 46, 46-48 (Fla. App. 1980) (holding condition prohibiting probationers who were convicted of uttering or burglary from engaging in non-marital sexual intercourse was not reasonably related to their past or future criminality and therefore invalid); *Thomas v. State*, 519 So. 2d 1113, 1114 (Fla. Dist. Ct. App. 1988) (holding condition prohibiting probationer who was convicted of grand theft and battery from becoming pregnant was not reasonably related to her past or future criminality and therefore invalid).

Each case involving a challenge to a probation condition requires a fact-specific analysis. Thus, each case is necessarily limited to the facts presented in the case. None of the aforementioned cases established a general rule that restrictions on procreation were never an appropriate condition of probation. Further, none of these cases presented facts comparable to the present case.

Hence, it is not true that the decision below, which found the probation condition to be valid, is in conflict with the cases cited by petitioner. The mere fact that a probation condition was found to be invalid in those cases does not demonstrate that the decisions are in conflict with this case.

IV. This Case Is Not Otherwise Appropriate For Review.

The judgment below is not in conflict with this Court's precedents. This court has never held that probationers have a fundamental right to procreation that cannot be limited, even where the condition advances the purposes of probation, including the need to rehabilitate the probationer and protect the public. Petitioner's reliance on *Skinner v.*

Oklahoma, 316 U.S. 535, 541 (1942), and the contraception cases is misplaced. The decision below does not conflict with any of the cited cases.[5]

In *Skinner*, this Court held that a state statute allowing for the sterilization of certain repeat offenders violated the Equal Protection Clause. 316 U.S. at 541-43. The Court stated that "[w]hen the law lays an unequal hand on those who have committed intrinsically the same quality of offense and sterilizes one and not the other, it has made as an invidious a discrimination as if it had selected a particular race or nationality for oppressive treatment." *Id.* at 541. Because the law unfairly discriminated between offenders whose offenses were "intrinsically the same," *id.* at 539, the Court concluded that the Equal Protection Clause was violated. The Court did not hold that state-sponsored sterilization or more temporary and less severe limits on procreation would never be constitutional.

The contraception line of cases is also not in conflict with the decision below. Each of the contraception cases involves a statute of general applicability affecting citizens at large. *See, e.g., Griswold v. Connecticut*, 381 U.S. 479 (1965) (holding that ban on use of contraceptives by married couples unconstitutionally intrudes on right to privacy); *Eisenstadt v. Baird*, 405 U.S. 438, 453 (1972) (holding that law prohibiting use of contraceptives by unmarried persons violated equal protection because it treated married and unmarried persons differently); *Carey v. Population Servs. Int'l*, 431 U.S. 678, 685-86 (1977) (holding that prohibition

---

[5] To the extent that petitioner appears to be challenging Wisconsin's probation statute as overly broad (Pet. at 15-17), respondent notes that petitioner did not raise such a claim in the state courts. Hence, any challenge to the Wisconsin probation statute would not properly be before this Court. This case presents neither a statutory challenge nor an Equal Protection challenge.

of distribution of contraceptives to persons over sixteen except through licensed pharmacist unconstitutionally burdened right to privacy, and served no compelling state interest). In each case, the Court concluded that the statute at issue did not survive strict scrutiny review.

The present case is very different than the contraception cases. Most notably, the present case involves a condition of probation. The restriction applies only to one convicted felon, and not to a broad group of law-abiding citizens. As recognized by this Court in *Knights*: "Inherent in the very nature of probation is that probationers do not enjoy the absolute liberty to which every citizen is entitled." 122 S.Ct. at 591 (internal quotation omitted). "Just as other punishments for criminal convictions curtail an offender's freedoms, a court granting probation may impose reasonable conditions that deprive the offender of some freedoms enjoyed by law-abiding citizens." *Id.*

The present case is not in conflict with *Zablocki v. Redhail*, 434 U.S. 374 (1978). *Zablocki* involved a general state statute affecting any citizen who was behind in child support payments. The statute provided that any resident who was under an order for child support and sought to marry had to demonstrate that the children in the support order were "not then and [were] not likely thereafter to become public charges." *Id.* at 375. This court noted that the statute created a class of people for whom the right to marry was restricted. "Some of those in the affected class, like appellee, will never be able to obtain the necessary court order, because they either lack the financial means to meet their support obligations or cannot prove their children will not become public charges." *Id.* at 387. This Court found numerous shortcomings in the statute, *id.* at 388-90, and struck down the statute, concluding that it violated the Equal Protection Clause. *Id.* at 382, 391.

Contrary to *Zablocki*, the present case presents a narrow restriction on one convicted felon who has intentionally failed to support his nine children. The present case does not involve an overbroad statute that serves to prevent those who may be willing, but unable, to support their children from marrying or from having children. Petitioner was not convicted because he was financially unable to support his children; he was convicted because he was unwilling to support his children. Notably, most of the "numerous other means" which were articulated in *Zablocki* have been used to try to get Oakley to comply with his child support obligations. Oakley has been subjected to wage assignments and criminal proceedings (6/16/98 Tr. at 20). While in custody, some of the wages he earned through work release were used to pay his support obligations (*id.*). As a condition of probation in the present case, Oakley must maintain full-time employment and pay his child support (1/13/99 Tr. at 29).

No one disputes that it is an appropriate condition of probation that Oakley must pay his child support obligations. If Oakley again intentionally fails to support his children, he will be subject to revocation of his probation and further criminal charges. The result of either of these may be further incarceration, which would restrict his liberty generally, but specifically would restrict his ability to procreate. Nonetheless, petitioner apparently views these as more constitutionally valid means. The soundness of this view is questionable.[6] *See generally*, Sherry F. Colb, *Freedom from*

---

[6] Notably, petitioner asserts that many probationers will accept conditions of probation that limit procreation in lieu of receiving prison sentences. Pet. at 28-29. This is likely true because these probationers believe that incarceration is truly a much greater infringement on their liberty than any short-term requirement that they do not procreate.

Incarceration: Why is this Right Different from All Other Rights?, N.Y.U. L. Rev. 781 (1994) (arguing that right to be free from physical confinement is, and ought to enjoy the status of, a fundamental right).

This is not to say that a court can impose a probation condition impinging on procreative rights in any case where the court could have sentenced the criminal defendant to prison. Pet. at 24-25. Rather, where, as here, the condition is not overly broad and is reasonably related to the person's rehabilitation, then a court may appropriately consider that the condition might be a less restrictive alternative to incarceration and impose such a condition.

Petitioner cites cases where courts have taken the children into state custody, apparently suggesting that this may be less offensive to the Constitution. Pet. at 24 n.15. "[T]he interest of parents in the care, custody, and control of their children [] is perhaps the oldest of the fundamental liberty interests recognized by this Court." *Troxel v. Granville*, 530 U.S. 57, 65 (2000), citing *Meyer v. Nebraska*, 262 U.S. 390, 399, 401 (1923). This Court has held that the "liberty" protected by the Due Process Clause includes the right to establish a home and bring up children, or the right to direct the upbringing and education of their children. *Id.* Any contention that the right to procreate is more fundamental than the right to have custody of and raise one's own children cannot be supported by the Constitution or this Court's precedent. In some cases, like the present case, it is much more reasonable and appropriate to condition procreation on the probationer's willingness to adhere to his support obligations than it would be to take the children into state custody.[7]

---

[7] This is especially true where there is no evidence that the children's mothers are not adequately caring for the children.

Limiting Oakley's right to father additional children until he establishes that he is following the law by not intentionally failing to support his current nine children is a reasonable, constitutional restriction on this right. The probation order entered below is not overly broad and is reasonably related to Oakley's rehabilitation. The decision below, which upheld the validity of this condition, is not in conflict with this Court's precedent interpreting the Fourteenth Amendment.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

JAMES E. DOYLE
Attorney General

DIANE M. WELSH*
Assistant Attorney General

Wisconsin Department of Justice
Post Office Box 7857
Madison, Wisconsin 53707-7857
(608) 266-1740

* *Counsel of Record*

July 12, 2002